No. 97-1914

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CABLE NEWS NETWORK, INC.;
TURNER BROADCASTING SYSTEM, INC.;
ROBERT RAINEY; DONALD HOOPER; and JACK HAMANN,
Petitioners,

v.

PAUL W. BERGER; ERMA R. BERGER; UNITED STATES OF AMERICA; RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; and KRIS MCLEAN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

DAVID C. KOHLER
JENNIFER FALK WEISS
CABLE NEWS NETWORK, INC.
One CNN Center
P.O. Box 105366
Atlanta, GA 30348-5366

P. CAMERON DEVORE *
JESSICA L. GOLDMAN
MICHELE EARL-HUBBARD
ERIC M. STAHL
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150
Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITIONERS' REPLY BRIEF

Contrary to the Bergers' claims, Br. in Opp'n at 2, 3, 11, 22-26, CNN has never argued that the First Amendment is either a "sword" or a "shield," absolving the news media from liability for crimes or torts committed in the course of newsgathering. The Bergers' rhetoric fails to address the first Question Presented in the Petition: whether CNN can be held liable for a *constitutional* violation *as if it were an arm of the government*. The Bergers simply dismiss the second Question Presented—whether a search otherwise authorized by a warrant violates the Fourth Amendment when law enforcement agents allow journalists to observe it—by arguing it "does not concern the Media." *Id.* at 10. In both cases, the Bergers fail to respond meaningfully to the reasons advanced by CNN for granting the Petition.

As to the first Question Presented, both the Bergers and the Ninth Circuit ignore the news media's disassociation from government inherent in our constitutional structure and long recognized by this Court and others. Pet. at 21-23. To accept the Bergers' argument and the opinion below is to accept that—for purposes of *Bivens* liability—the Constitution makes no distinction between the press and the police, or between press coverage of government activity and that activity itself. By arguing the contrary, CNN does *not* assert "the Media . . . cannot commit a crime." Br. in Opp'n at 22. Rather, it asserts simply that constitutional liability differs from statutory or common-law liability, and that the state action doctrine's limitation on "the power [of courts] as directed against . . . private interests" must be heeded—particularly where the private interest in question is constitutionally recognized as separate from the government. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982). The First Amendment is relevant in this regard because it defines and reinforces the news media's independence from government.

Moreover, the Bergers err in claiming the Ninth Circuit opinion does not conflict with this Court's state action jurisprudence. Neither CNN's alleged conduct nor the "aggregate of facts here" amounts to joint action consistent with this Court's precedents. Though the state action inquiry may require "sifting facts and weighing circumstances," *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), this Court has never found state action under facts akin to those present here. The two courts of appeals that have confronted the state action question in the context of media "ride alongs"—the Ninth Circuit here and the Eighth Circuit in *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997)—are in conflict. Furthermore, other courts will confront similar cases in the future.[1] This Court's review is necessary because the Ninth Circuit's holding now casts a huge shadow over the news media's ability to effectively cover government law enforcement activities.

As to the second Question Presented, the Bergers' claim that the Fourth Amendment issue is of no concern to CNN is untenable. CNN could not be liable under *Bivens* unless the search violated the Fourth Amendment. More generally, the news media are concerned with the immediate implications for news coverage of a holding that their presence at an otherwise permissible search is unconstitutional. Furthermore, the Brief in Opposition does not even attempt to refute the 2-2 conflict (Pet. 25-28) among the courts of appeals on this issue.

As an initial matter, CNN must address the Bergers' mischaracterization of the facts.

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[1] *See, e.g., Wilson v. Layne*, 141 F.3d 111, 132 (4th Cir. April 8, 1998) (*en banc*) (Murnaghan, J., dissenting) (given "the prevalence of real-life police dramas on television," other courts "soon enough" will confront questions about the constitutionality of "ride alongs"), *petition for cert. filed*, —— U.S.L.W. —— (U.S. July 7, 1998) (No. 98-83).

CORRECTION OF THE BERGERS' MISSTATEMENT OF THE CASE

In an effort to shoehorn the facts into their "joint action" theory, the Bergers attribute significance to, or otherwise mischaracterize, the facts in a manner that cannot be sustained by the record. Most blatantly, the nefarious implications the Bergers attribute to the letter confirming that reporter Hamann had permission to observe the FWS search are plainly refuted by the document itself. The letter, which can be read in full in the Ninth Circuit opinion, App. 4a-5a, on its face is neither a *quid pro quo* arrangement nor a formally executed "contract," as the Bergers repeatedly suggest. *Nowhere* does it say CNN has been granted "exclusive access" to obtain "outtakes," and nowhere does CNN "grant[] the Government Agents' express desire to publicize" their enforcement efforts. Br. in Opp'n at 3-4. It only confirms Hamann's previously obtained permission for a "ride along," and states that CNN agreed to embargo any news footage until showing the footage posed no danger to any defendant's fair trial rights. The letter does not evince participation by CNN in the search or the already ongoing—and completely independent—criminal investigation of Paul Berger. Nor does it distinguish this case from others in which journalists seek and obtain permission to observe police at work.

Similarly, the conduct of the search and behavior of the government officials in no way suggest government participation in CNN's newsgathering, or CNN's support of any government objective. For example, the Bergers complain about Assistant U.S. Attorney McLean taking time, during the several-hour search, to be interviewed on camera by CNN. Br. in Opp'n at 7. Yet that interview is not evidence of any conspiracy to violate the Bergers' rights; rather, McLean simply summarizes the government's purpose in allowing CNN to record the FWS search as educating the public that there are consequences, in the form of government enforcement, to

illegally poisoning protected wildlife.[2] ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 11/pages 2-8.

Other claims by the Bergers either are not borne out by the record,[3] or are irrelevant to the issues in this case.[4] For example, the Bergers' many complaints about the validity of the warrant and the conduct of the FWS officers, Br. in Opp'n at 4-6, if at all relevant, are misplaced. Before Paul Berger's criminal trial, a magistrate judge—fully aware of CNN's presence during the warrant's execution—specifically upheld the FWS search over Berger's motion to suppress. App. 7a-9a, 39a-41a, 52a-54a. Nor would it have been appropriate for the search warrant to authorize CNN to search the Bergers' ranch, as the Bergers suggest, Br. in Opp'n at 6: The CNN crew members were not law enforcement officials. They had no interest in—

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[2] "It is in fact a legitimate function of law enforcement to facilitate accurate reporting on law enforcement activities" because "the deterrence of crime [is] vital to the broader [law enforcement] mission." *Wilson*, 141 F.3d at 118 (citation omitted).

[3] CNN includes a more complete refutation of the Bergers' characterization of the facts in its Brief in Opposition to the Bergers' Conditional Cross-Petition for Writ of Certiorari (No. 98-38). As detailed with citations there, at 3-8, Paul Berger's consent to the search of his home is captured on tape; the CNN crew rode in its own vehicle and was dressed in a manner readily distinguishable from most of the government agents; the claimed threat of arrest is misleading and taken out of context; Berger admits on tape to killing every eagle he can; CNN used no hidden camera; and CNN has used this news footage only for its news programs, and not since 1994.

[4] The Bergers complain Berger was never read his *Miranda* rights, yet at no time was he under arrest. They criticize Hamann's introduction of his news report and allege McLean "disparag[ed]" them, yet the Bergers have not sued for defamation, or even alleged that anything CNN reported was false. (In any event, Hamann's statement about the number of eagles Berger had killed was based on Berger's own statements during the search, and was never included in the actual news programs; and McLean's recorded interview contains no derogatory statements. E.R. *Hamann* 5/8 *& Hanlon* 8/8/Tape 11/pages 2-4). The Bergers claim CNN was provided with "confidential" information, yet even if true, it is not unlawful for the news media to request or obtain such information.

and certainly did not engage in—searching for criminal evidence. As is typical with journalist "ride alongs" with law enforcement agents, CNN was there solely to cover news.

REASONS THE WRIT SHOULD BE GRANTED

1. The Bergers contend that CNN's independent "motive" for recording the Berger search was "irrelevant" to the state action analysis, but that its "conduct was dispositive." Br. in Opp'n at 12, 13. They are wrong on both counts. First, as to the relevance of CNN's motive or purpose, the Bergers misstate the holding of *United States v. Cleaveland*, 38 F.3d 1092 (9th Cir. 1994). *Cleaveland* in fact held that a private power company employee who searched for evidence of theft with police assistance was *not* a government actor, *specifically because the agent had a "legitimate, independent motivation"* for conducting a private search for evidence of a crime. *Id.* at 1094 (emphasis added). The case thus holds that private action undertaken for independent, private goals is not state action, fully supporting *CNN's* position. Furthermore, even under the Bergers' asserted test for determining the significance of motive in the state action analysis—"examin[ing] the relationship between the Government Agents and private party," Br. in Opp'n at 13—CNN's independent newsgathering purpose indicates it was not a state actor. Its relationship with the FWS was that of a news organization seeking and obtaining access to the activities of the subject of its reporting.

Also, even if the Bergers are correct that a private party's conduct is "dispositive" of the state action question, *id.*, CNN conducted itself as a private media entity whose actions were not "fairly attributable" to the government. *Lugar*, 457 U.S. at 937. It is undisputed that CNN was present at the Berger ranch not to search for criminal evidence, as was the government, but to report news. The footage of the search was not used in Berger's criminal trial, as footage recorded by the government might have been, but was used solely in CNN news programs.

The letter on which the Bergers and the Ninth Circuit so heavily rely was not a contract to *execute* a search—conduct that would be the province of government—but simply a statement that CNN could *watch* a search—journalistic conduct.

The Bergers attempt to explain away the Eighth Circuit's conflicting opinion in *Parker*, arguing the panel "did not conduct any state action analysis." Br. in Opp'n at 14. This is false. The lead opinion, joined by one concurring judge, specifically analyzed the state action question. 93 F.3d at 447-48. The court concluded the television news crew was not a state actor because its mission was distinct from that of the police, it was present for independent newsgathering purposes, and it did not assist police in their search—all of which also are true here.[5] Finally, other than pointing out the unsurprising fact that some of the cases cited in the Petition involve circumstances not identical to the present case, the Bergers fail to—and cannot—refute the well-established principle that private citizens do not act under color of law when they observe or accompany police for purposes independent of law enforcement. Br. in Opp'n at 15-16 (attempting to distinguish *Price v. Baker*, 693 F.2d 952 (10th Cir. 1982), *Jones v. Taibbi*, 508 F. Supp. 1069 (D. Mass. 1981), and *Freedman v. Coppola*, 614 N.Y.S.2d 833 (N.Y. App. Div. 1994)). The Bergers fail to cite any previous case in which journalists engaged in newsgathering were held to be state actors, and fail to refute the Petition's explanations of why the opinion below conflicts with established state-action principles.

Moreover, the Bergers cannot overcome CNN's independent motive by arguing "the evidence in the aggregate" justifies treating CNN as a government actor. Br. in Opp'n at 18. Indeed, the hodge-podge of "facts" the

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[5] The Bergers implicitly acknowledge the conflict between *Parker* and the Ninth Circuit's opinion in this case, arguing *Parker* would have been decided differently if only the Eighth Circuit "had . . . conducted the appropriate analysis." Br. in Opp'n at 15 n.20.

Bergers assert fails to show CNN shared a "common unconstitutional goal" with the FWS to search the Berger ranch in violation of the Fourth Amendment. *Id.* Most of the 14 asserted points demonstrate *not* that CNN should be treated as a state actor, but that CNN acted as journalists ordinarily do in arranging "ride alongs" with police to obtain access and information for news reports: CNN made prior arrangements to do so (points 2, 3, & 5). Furthermore, as the case law makes evident, Pet. at 13-14, 26-27, it is in no way unusual for reporters in such situations to be permitted to follow police as they enter private property, to record the police action, or to broadcast the resulting news footage (points 1, 8-11, & 13). None of this suggests CNN behaved in any way other than as private journalists. The remainder of the Bergers' litany consists either of actions undertaken by and attributable solely to the FWS, not to CNN (points 4 & 14), or mischaracterizations of facts not sustained by the record (points 6, 7, & 12).[6] The Bergers' blunderbuss presentation of the facts does not show CNN shared an unconstitutional goal with the FWS, but rather shows CNN's goal was to gather news and report on government efforts to combat environmental crimes.

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[6] CNN respected Paul Berger's right to a fair trial by agreeing not to show news footage of the search until that right could not be jeopardized. The Bergers' contortion of this into "evidence" of CNN's intent to violate their constitutional rights (point 6) is proof not of any "state action," but only of the extent of the Bergers' efforts to force the facts of this case to fit their theory. The record shows that CNN's "participation" at the pre-search briefing (point 7) was consistent with, and no more extensive than necessary to facilitate, its newsgathering purpose. Pet. at 5. Nor did CNN and the FWS "work together to deflect detection" of CNN (point 12): Berger has never alleged that CNN misled him about its identity or made any effort to hide its large, hand-held camera. Furthermore, the record shows no "diversion" when Berger objects to being filmed. Rather, it is Berger who immediately initiates a conversation with government poison specialists who had previously been searching his poison shed. ER *Hamann* 5/8 & *Hanlon* 8/8/Tape 8/page 13/Tape 21/page 3.

The Bergers also suggest CNN's conduct was state action because the news footage it recorded was "confidential" and obtained with the assistance of the FWS agents. Br. in Opp'n at 19-21. Clearly this cannot amount to "joint action"; otherwise, the news media would be subject to constitutional liability any time an official "leaked" government secrets or otherwise assisted the news media in obtaining information not readily available to the public. When journalists seek access to such information—with or without the assistance of government agents—they are not "state actors" who may be treated as government agents themselves; rather, they act as the press, in a manner the Constitution expects the press to act. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (praising as "courageous reporting" articles that relied on stolen and leaked classified Pentagon documents); Potter Stewart, *"Or of the Press,"* 26 Hastings L.J. 631 (1975) (Constitution contemplates news media will seek out confidential information). In contrast, the Bergers rely only on cases in which courts found the government properly *could refuse to release* certain secret information to the press. Br. in Opp'n at 20 (citing *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989) and *United States v. Capra*, 501 F.2d 267 (2d Cir. 1974)).[7] Neither case remotely suggests the news media engage in state action when they *do receive* such information from government, or even that it is unlawful for the government to provide the information.

2. Finally, the Bergers inexplicably contend that it is of no concern to the news media whether an otherwise proper search violates the Fourth Amendment when law enforcement agents allow journalists to observe it. CNN,

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[7] The Bergers' reliance on *dicta* in *Branzburg v. Hayes*, 408 U.S. 665 (1972) (reporter can be compelled to testify to grand jury), likewise is misplaced, because CNN does not claim a "constitutional right of special access to information not available to the public generally." Br. in Opp'n at 20. Instead, the issue is whether or not the Fourth Amendment applies to CNN.

in particular, certainly is concerned with the Ninth Circuit's determination that the search violated the Fourth Amendment, since an underlying constitutional violation is one of the two elements of *Bivens* liability.[8] The news media more generally are concerned with whether their presence at an otherwise permissible search violates the Fourth Amendment: If the Ninth Circuit opinion on this

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[8] The Bergers' defense of the Ninth Circuit's Fourth Amendment holding, Br. in Opp'n at 26-28, relies on cases and statutes irrelevant to the issue of media presence at a search. Contrary to the Bergers' suggestion, *id.* at 27, violation of 18 U.S.C. §§ 3105, 2234, 2236, or 3109, which govern federal agents' execution of warrants, does not invalidate agents' authority to be on the premises or to execute a valid warrant, and has *no* bearing on liability of third-party witnesses to a warrant's execution. All the cases the Bergers cite involve the conduct of officers and make no mention of third-party observers. *E.g., Lawmaster v. Ward*, 125 F.3d 1341 (10th Cir. 1997) (officers acted unreasonably in ransacking home; no third parties involved). Some actually permit conduct beyond that expressly authorized by the warrant. *E.g., Michigan v. Summers*, 452 U.S. 692 (1981) (detention of occupants permissible even where not expressly authorized by search warrant). Other cases cited involve third parties assisting police in actually searching for evidence; they thus are factually distinguishable, and in any event do not consider the effect of third-party *observers*. *United States v. Wright*, 667 F.2d 793 (9th Cir. 1982) (state drug officers could assist federal agents in executing a search); *United States v. Clouston*, 623 F.2d 485 (6th Cir. 1980) (private security experts could assist police search). The Bergers cite *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), but ignore the Sixth Circuit's subsequent decision in that case, which held that the presence of a private third party at the execution of a warrant is not in itself unconstitutional. *Bills v. Aseltine*, 52 F.3d 596 (6th Cir. 1995).

Contrary to the Bergers' contention, *Moncrief v. Hanton*, 10 Media L. Rptr. 1620 (N.D. Ohio 1984) and *Higbee v. Times-Advocate*, 5 Media L. Rptr. 2372 (S.D. Cal. 1980), two early cases finding "ride alongs" constitutionally permissible, have not been "supersed[ed]" by *Soldal v. Cook County*, 506 U.S. 56 (1992), or *Winston v. Lee*, 470 U.S. 753 (1985). *Soldal* expressly rested on the Fourth Amendment's protection of *property* interests, not its privacy component. 506 U.S. 62 and n.7. In holding a compelled surgical procedure unconstitutional, *Winston* relied entirely on Fourth Amendment cases that predate *Higbee*, most by decades. 470 U.S. at 758-62.

issue is allowed to stand, media access to such government activities will be curtailed significantly.[9]

The Bergers do not even address the direct conflict, described in the Petition at 25-28, between the Ninth and Second Circuits on the one hand and the Fourth and Eighth Circuits on the other. The Bergers fail to cite the Fourth Circuit's recent 6-5 *en banc* opinion in *Wilson v. Layne,* 141 F.3d 111, which found, contrary to the Ninth Circuit, that permitting journalists to follow officers into a home and record the execution of a warrant violates no clearly established Fourth Amendment right. The plaintiffs in *Wilson,* who stand in the same position as the Bergers do in this case, recognized in their recent petition to this Court that the present state of the law is that media "ride alongs" with police "are clearly unconstitutional in the Second and Ninth Circuits, and not clearly unconstitutional, if unconstitutional at all, in the Fourth and Eighth Circuits." *Id.*, Pet. for Cert. at 12, —— U.S.L.W. —— (U.S. July 7, 1998) (No. 98-83).

CONCLUSION

In sum, the Brief in Opposition fails to address—much less refute—the reasons set forth in the Petition for granting the Writ of Certiorari. The Ninth Circuit's holding on both elements of *Bivens* liability—the "color of law" requirement and the underlying constitutional violation—conflicts with decisions of other courts of appeals and raises important questions that require this Court's review. Sup. Ct. R. 10(a), (c). The unsettled state of the law has left both journalists and police uncertain over the constitutionality of the not uncommon "parallel[] and contemporaneous" conduct, *Parker,* 93 F.3d at 448, that CNN and FWS engaged in here. The natural result of such uncertainty is that media access to government law enforcement activities will dwindle, and newsgathering will suffer, until this Court resolves the conflicting judicial views. CNN therefore respectfully requests that the Court grant its Writ of Certiorari.

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[9] *See generally* Br. of *Amici Curiae* ABC, Inc., *et al.* in Support of Petitioners.

Respectfully submitted,

DAVID C. KOHLER
JENNIFER FALK WEISS
CABLE NEWS NETWORK, INC.
One CNN Center
P.O. Box 105366
Atlanta, GA 30348-5366

P. CAMERON DEVORE *
JESSICA L. GOLDMAN
MICHELE EARL-HUBBARD
ERIC M. STAHL
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150
Counsel for Petitioners

* Counsel of Record